

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANT

527

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,785

UNITED STATES OF AMERICA,
Appellee

vs.

ODELL GRIFFIN,
Appellant

APPEAL FROM JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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United States Court of Appeals
for the District of Columbia Circuit

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Appellee)	
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BRIEF OF APPELLANT

ISSUES PRESENTED

(1) Was the identification of appellant by one eyewitness, Mr. Green, so prejudiced by suggestiveness planted by another eyewitness, Miss Harrod, as to fatally taint his conviction by denying appellant a fair trial under due process of law?

(2) Did the trial Court err in denying appellant's motion to strike Mr. Green's trial identification testimony?

(3) Did the trial Court err in not granting appellant's request for a mistrial when it was obviously prejudicial to admit the newspaper picture with or without the accompanying article?

— — — — —
This case has not previously been before this Court.

REFERENCES AND RULINGS

On February 27, 1968, the trial Court denied appellant's motion to strike Mr. Green's identification testimony on the grounds of suggestiveness following a suppression hearing before trial. (Tr. 31)

STATEMENT OF THE CASE

On February 27 - 28 and March 3, 1969, the appellant was tried by a jury before Judge Howard F. Corcoran on a seven count indictment; two counts charging him with assaulting a person having charge of Mail Matter of the United States in violation of 18 U.S. Code § 2114; two counts charging him with robbery and assault with a dangerous weapon in violation of 22 D.C. Code § 290, 502; three counts charging him with assault with a dangerous weapon, that is, a pistol. On March 3, 1969, the jury found the appellant guilty on all seven counts.

The appellant was sentenced by the United States District Court on August 8, 1969, to ten (10) years on each count, to run concurrently, under Section 5010 (c) of the Youth Corrections Act.

This is an appeal from that judgment.

On August 16, 1968, the postal office known as Truxton Station, located at the intersection of North Capital Street and Florida Avenue, Washington, D.C., was robbed by two gunmen at about 11:45 a.m.

At this time there were three postal employees in the station. Miss Harrod was stationed at the first window of a service counter with three windows, about 8 feet from the entrance. Her supervisor, Mr. Tutson, was standing at the Parcel Post window, the last of the three counter windows, about 10 feet from the first window. Mr. Green, an off-duty employee who came to the station about five minutes before the robbery to pick up his pay check, was standing about an arm's length from and conversing with Mr. Tutson. The day was bright and the post office was well lighted. The postal employees had an unobstructed view of both gunmen about waist level. (Tr. 52-5, 204-6, 221-3, 231-4, 237-9).

The first gunman approached Miss Harrod's window (closest to the entrance) and asked her about the closing time. She replied: "Five o'clock." He stated that he wanted to know the closing time for lunch, and pulled a gun on Miss Harrod after she said: "We don't close for lunch." In response to this robber's demands, she pulled the blinds and surrendered about \$100 in stamp stock and about \$74 more in money order receipts. Miss Harrod estimated that the robbery took about 7 minutes. (Tr. 51-6).

Concurrently, the second gunman approached Mr. Tutson and Mr. Green at the third window. He pulled a gun on them and instructed them to "put your hands on the counter get the money." Simultaneously, the first gunman said "raise your hands." These conflicting instructions were apparently unresolved. The second gunman then jumped over

the counter and took about \$400 from the counter drawer and from an open safe. Mr. Green estimated the episode lasted 4 to 5 minutes. Then all the employees were directed to lie on the floor while the gunmen escaped. (Tr. 57-8, 205-9, 220-3, 237-9).

Subsequently, 35 days later, Miss Harrod saw a picture of appellant's face in the Washington Post on Saturday, September 21, 1968. She believed this picture to be that of the gunman who had been standing in front of her during the robbery of the post office on August 16, 1968. (Tr. 9, 10, 20) It was this newspaper identification of appellant's picture and her subsequent conversations with Mr. Green that led to appellant's pretrial motion to strike Mr. Green's identification testimony. (Tr. 8).

At the preliminary hearing on the issue of suggestiveness, Miss Harrod testified as follows in response to questions by Court-appointed counsel for appellant:

"Q. Now, directing your attention to on or about September 20, 1968, did you have occasion to read either the Washington Post or the Evening Star newspapers in the city?

A. Yes, sir.

Q. Did you have occasion to see a picture of a certain individual?

A. Yes.

Q. And, do you recall what you did after seeing that picture with regard to a certain Mr. Green?

A. I didn't do anything.

Q. Did you have any conversation with Mr. Green about that picture?

A. Yes.

Q. And how did that come about? Did you call him?

A. I talked to him at work on Monday.

Q. At work on Monday?

A. Yes.

Q. Now, when you talked to him at work on Monday, did you have a copy of that picture?

A. No, I didn't.

Q. * * * You did not have a copy with you then. What did you say to Mr. Green at that time?

A. I asked him if he had seen the paper.

Q. And, he stated?

A. He stated yes.

Q. He had seen it?

A. Yes.

Q. Did he say anything further?

A. I asked him about the picture.

Q. What did you ask him specifically?

A. I asked him did he see the picture.

Q. The picture of what?

A. Of this person.

Q. Do you recall what your exact words were? It is most important that we get as close as possible exactly what you said to him.

A. I asked him if he seen the picture of the person in paper. He said he didn't remember. I said, 'Well.'

Q. What did you say then?

A. I said I had a picture.

Q. Pardon.

A. I told him I had a picture.

Q. You had a picture of what? Were these your exact words? Again give us your exact words, as close as you can recall.

A. He said he didn't remember, and I said I had a picture.

Q. Now did Mr. Green at any time ask you what picture you were talking about or who was in the picture or anything like that?

A. No.

Q. He never asked you that?

A. No.

Q. You never suggested to him what the picture was?

A. No, I showed it to him.

Q. You showed it to him?

A. And, he recognized it. (Tr. 9-11).

*

*

*

Q. Very well. Now, let me ask you this. After this conversation, you didn't have the picture. Did you drop the subject then?

A. No, this was before I came to work Monday.

Q. Yes.

A. I brought the picture to work with me.

Q. Again, now let's get this - where did this first conversation take place?

A. On the telephone. (Tr. 12).

*

*

*

Miss Harrod stated that this telephone conversation with Mr. Green took place about 8.15 a.m., before she went to work, and Mr. Green was then at work in the Post Office. She cut the picture out of the paper, took the picture to work and showed it to Mr. Green. (Tr. 13-14). In response to defense counsel's questions, she described Mr. Green's reactions as follows:

Q. And, you walked over to him with the picture?

A. Yes.

Q. And, what were your exact words again if you can recall?

A. I ask him did he remember the person.

Q. Just remember the person?

A. Yes.

Q. What were his words?

A. He looked at the picture and said, 'yes.'

Q. Just 'yes.'

A. Yes, he said, yes this person was the person who had stood in front of me at the robbery on the 16th of August. (Tr. 14-5)

The testimony of Mr. Green at this pretrial hearing flatly contradicts Miss Harrod on the issue of suggestiveness as shown by the following responses to questions by appellant's counsel concerning the telephone conversation on Monday morning:

* *

*

*

Q. The best recollection you have, sir.

A. I think Miss Harrod indicated that - She asked me had I looked at the paper. I said that I had not.

Q. You said you had not?

A. I had not looked at the paper.

Q. Very well.

A. She said, 'The fellow who robbed us, his picture is in the paper.'

Q. His picture was in the paper?

A. I said, 'Well, I don't know. I haven't seen it.'

Q. Now, did there come a time when she showed you the picture?

A. She brought the picture of the fellow to work with her.

Q. I am going to show you what has been identified as Defendant's Exhibit Number One for identification. Is that, sir, the picture she showed you?

A. I believe it is.

Q. Do you recall what was said at the time she showed you this picture?

A. She said that - Well, she asked me, 'Isn't this the fellow?' I looked at it as I said, 'Yes, it is.' I said, 'I am surprised I didn't see it.'

Q. This was some time, approximately an hour at any rate, after she had told you on the phone that she had seen the picture of the fellow who robbed you. Isn't that correct, sir - an hour or probably longer?

A. Probably longer.

Q. Possibly longer?

A. Yes.

Q. When she talked to you at that time, she again indicated, isn't this the fellow that robbed us?

A. Well, in substance, yes. (Tr. 19-21).

Upon cross examination, Mr. Green amplified Miss Harrod's telephone conversation as follows:

Q. When was the first time you knew what picture she was talking about?

A. As her conversation continued, she said, 'The person who robbed us - his picture is in the paper.' She said, 'I am sure, but I would like for you to see him.' She brought it in for me to see.

Q. She said she was sure?

A. She felt sure it was the person who robbed us. (Tr. 24-5).

Further questioning of Mr. Green by the Court revealed that Mr. Green subsequently identified the appellant at the lineup and that this lineup identification was based upon the memory of the event rather than the newspaper picture. (Tr. 26-7).

The trial court refused to suppress Mr. Green's trial testimony and appellant excepted. (Tr. 31-2).

Miss Harrod and Mr. Green attended a lineup on September 25th and individually identified the appellant as the robber; however, Mr. Tutson, did not see the newspaper picture because he was on leave and he could not identify appellant in the same lineup. (Tr. 49, 61, 225-7, 240).

Appellant denies that he was in the post office when it was robbed. To establish an alibi, defense witnesses testified that appellant was home during the time of the robbery. Henry Jackson, a taxi driver, testified that he delivered appellant's baby sister to

1632 Q Street, S.E., at 11:45 or 11:46 a.m. on August 16, 1968 that appellant was lying on the couch at that time and that appellant paid \$1.00 for the taxi fare. (Tr. 252). Mr. Jackson testified that he visited with appellant's sister and appellant for about 10 minutes - until 11:56 a.m. (Tr. 265). These precise times were corroborated by entries in a taxi manifest. (Tr. 254). See defendant's exhibit #2. Jerutha Diggs, appellant's sister, and appellant also corroborated Mr. Jackson's testimony. (Tr. 271, 288, 294-5).

At a bench conference, before Miss Harrod was questioned by the Government about the newspaper picture, the trial Court cautioned counsel: "Don't get another crime into it." (Tr. 59).

The jury was not told why the appellant's picture was printed in the Washington Post because the trial Court wanted to avoid tying the newspaper picture with another crime. (Tr. 59).

Appellant's counsel objected to the unexplained background of the newspaper picture of appellant at a bench conference and asked for a mistrial because of the assumption that the jury would relate the picture to a crime. The trial Court did not grant a mistrial and stated:

"There is no evidence as to why it was in the newspaper. It could have been an automobile accident or something like that. It doesn't necessarily follow as to him being arrested for anything. (Tr. 62).

The jury found appellant guilty on all counts. (Tr. 368-9).

ARGUMENT

- I. THE IDENTIFICATION OF APPELLANT BY ONE EYEWITNESS, MR. GREEN, WAS SO PREJUDICED BY SUGGESTIVENESS PLANTED BY ANOTHER EYEWITNESS, MISS BARROD, AS TO FATALLY TAINT HIS CONVICTION BY DENYING APPELLANT A FAIR TRIAL UNDER DUE PROCESS OF LAW

The Supreme Court has recognized the critical nature of the pre-trial identification process and, in the Wade-Gilbert-Stovall trilogy, new guidelines were established. In *United States v. Wade*, 388 U.S. 218 (1967), the Court held that the accused is entitled to counsel at a pretrial lineup under the Sixth Amendment. The Court recognized the inherent dangers in eyewitness identification and that suggestibility is inherent in the context of confrontations; the Court held that pre-trial identification in a lineup without counsel should be excluded unless such evidence had an independent origin or unless its admission was harmless error. *Gilbert v. California*, 388 U.S. 263 (1967), like *Wade*, held that the requirement for counsel at lineups applied only after June 12, 1967. *Stovall v. Denno*, 388 U.S. 293 (1967), held that the requirement for counsel at a pretrial lineup was not retroactive and justified a one-man lineup in the eyewitness's hospital room because in this particular case, there was no way to know how long the witness would live.

The increasing number of appeals in this Circuit and the new Supreme Court guidelines lead this Court to review its own pretrial identification procedures in *Clemons-Clark-Hines v. U.S.*, 133 U.S. App. D.C. 27, 408 F. 2d 1230, cert. denied 394 U.S. 964 (1969). These consolidated appeal cases recognize that the identification pro-

cedure can be so unduly prejudiced as to fatally taint the conviction, when evaluated in the light of totality of surrounding circumstances, by creating a very substantial likelihood of irreparable misidentification. Speaking of the chronic uncertainties of eyewitness testimony, this Court quoted from *Wade*, 388 U.S. 218 at 228, as follows:

" * * * the confrontation compelled by the State between the accused and the victim or witnesses to a crime to elicit identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial * * * [a] major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification."

The scope of the problem is placed in sharp focus by the following quote in *Wade* from Wall, *Eyewitness Identification in Criminal Cases* 26 (388 U.S. at 229):

"(t)he influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor--perhaps it is responsible for more such errors than all other factors combined. Suggestion can be created intentionally or unintentionally in many subtle ways. And the dangers for the suspect are particularly grave when the witness's opportunity for observation was insubstantial, and thus his susceptibility to suggestion the greatest."

Similarly, the following observations from Wigmore apply to the case at bar. (3 Wigmore, *Evidence*, § 786(a), 790, 3rd ed. (1940).

* * *

"On the one hand, the process of recognition being more or less subconscious, it may be quite correct, even though no specification of marks can be given as reasons for recognition. On the other hand, the risk of injustice being so serious, the great possibilities of lurking error should cause hesitation."

" * * * it is, briefly, that a material object, particularly a writing, when presented as purporting to be of a certain origin, always tends to impress the mind unconsciously, upon the bare sight of it, with the verity of its purport. * * * Does it purport to be a picture of the place of murder? We look at it with an interest based on the unconscious assumption that it is that house. In short, we unwittingly give the document the credit of speaking for itself, though no human being has yet spoken for it. Now this tendency has to be rigorously repressed * * *."

Here we have a case where Miss Harrod saw appellant's picture in the Washington Post on Saturday - a picture taken presumably while appellant was in police custody and charged with another crime, and this picture was accompanied by an article in lurid detail designed to build circulation. Even so, it took her all weekend to make her own identification. Appellant contends this delay was caused by staleness of impression and recollection and that her ultimate identification was in itself the direct product of improper suggestive influence by the newspaper.

Miss Harrod describes her newspaper identification and her conversation with Mr. Green in the most confusing manner. Could one conclude that she didn't bring the picture to work with her because she was talking on the telephone, or because her recollection was blurred and confused? Mr. Green is positive that Miss Harrod identified the newspaper picture as the robber, both over the telephone and when she showed the picture to Mr. Green, and this she unequivocally denies. This is not the clear and convincing evidence (underlining supplied) which should be required to sustain a pretrial identification where suggestiveness is at issue. United States v. York, ___ U.S. App. D.C. ___, Sept. 24, 1969, Case No. 22468).

Once Mr. Green agreed with Miss Harrod that the appellant's newspaper picture was the same person who robbed the post office, the subsequent lineup identification and the trial identification are fatally tainted. Authority for this is found in Wade 368 U.S. 218 (1967), citing Williams & Hammelman, Identification Parades, Part I [1963] Crim. L. Rev. 479, 482.

Moreover, [i]t is a matter of common experience that, once a witness has picked out the accused at the lineup, he is not likely to go back on his word later on, so that in practice the issue of identity may (in the absence of other relevant evidence) for all practical purposes be determined there and then, before the trial.

In other words, Mr. Green, after agreeing with Miss Harrod's conclusion that the person in the picture is the robber, will adhere to this identification, as a matter of personal pride, regardless of subsequent doubts which might arise concerning the accuracy of the identification. He is like the juror who does not want to be handicapped by the facts because his mind is made up :

In United States v. Vaughn, ___, App. D.C. ___ (102-70 #5151), the Court referred approvingly to decisions which hold that confrontations where only a single suspect was present are inherently suggestive, but held that the prompt on-the-scene identification of the suspect's picture on his driver's license was an exception. In the case at bar we have a single suspect's picture, and as to Miss Harrod this was accompanied by a newspaper account of appellant's detention for another crime. There was no element of prompt on-the-scene identification to make an exception to the general rule of inherent suggestiveness.

The same rationale is found in United States v. Miller, ____
U.S. App. D.C. ____ (March 23, 1970 Case No. 22332) the Court said:

The presentation of only one suspect, in the custody of police, raises problems of suggestibility that brings us to the threshold of an issue of fairness." Wise v. United States, 127 U.S. App. D.C. 279, 282, 303 F. 2d 206, 209 (1967). Yet prompt identifications seem to be more reliable than stale ones, and by bringing the suspect before witnesses within moments of the crime, the police may be able to release an innocent man apprehended in error, and begin search for the perpetrator of the crime. See Simmons v. United States, 390 U.S. 377, 384-85 (1960).

In Simmons v. United States, 390 U.S. 377 (1960), the Court recognized that each case must be decided on its own facts and that in a proper case a conviction based upon a pretrial photographic identification which was unfairly suggestive so as to raise a very substantial likelihood of irreparable misidentification should be set aside.

Appellant urges reversal of his conviction for the reason that substantial issues have been raised as to whether the newspaper picture identification by two eyewitnesses was so necessarily suggestive and conducive to irreparable mistaken identification as to result in a denial of due process.

II THE TRIAL COURT'S REFUSAL TO STRIKE MR. GREEN'S TRIAL IDENTIFICATION TESTIMONY WAS REVERSIBLE ERROR.

The pretrial hearing was conducted after appellant moved to strike the trial identification of Mr. Green for the reason that Miss Harrod had seen a newspaper picture of the appellant and an accompanying article in connection with another crime.

The testimony of Miss Harrod which denies that she suggested that the picture of appellant was the robber is flatly contradicted by Mr. Green.

Trial judges realize that the most assertive witness is not invariably the most reliable one, particularly when the testimony of the assertive witness is flatly contradicted on the issue of suggestiveness.

Appellant urges that the test of suggestiveness should be conclusive when the witness to whom the suggestion was made testifies that the suggestion was made to him.

Appellant contends that the pretrial hearing established beyond a reasonable doubt that he was so unduly prejudiced as to taint his conviction. He was identified initially by an eyewitness whose testimony is most confusing and is flatly contradicted. His picture was accompanied by an article about his participation in another crime; there was no one else in the picture. The picture was published while appellant was in police custody.

The testimony of Miss Harrod in itself created a very substantial likelihood of irreparable misidentification because of suggestiveness in the accompanying newspaper article. To allow Mr. Green to identify, after a motion to strike, is nothing more than pyramiding Miss Harrod's testimony.

Appellant urges that it was reversible error to refuse his motion to strike Mr. Green's trial identification. Authorities to support this

contention are discussed above.

III THE TRIAL COURT ERRED IN NOT GRANTING APPELLANT'S REQUEST FOR A MISTRIAL WHEN IT WAS OBVIOUSLY PREJUDICIAL TO ADMIT THE NEWSPAPER PICTURE WITH OR WITHOUT THE ACCOMPANYING ARTICLE.

The trial Court wanted to avoid tying the newspaper picture with another crime. Appellant contends that this is recognition by the trial Court of the obvious prejudicial nature of such a tie. If the trial Court recognizes that appellant is prejudiced by admitting the article describing another crime, then basic logic leads one to conclude that he is equally prejudiced by admitting the picture without the article.

The trial Court cautioned counsel to avoid any reference to another crime when referring to the newspaper picture. This precluded appellant from his right to cross examination.

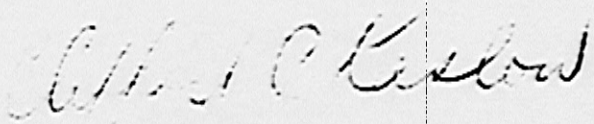
In this connection the Supreme Court in *United States v. Wade*, 386 U.S. 218 (1967) states as follows.

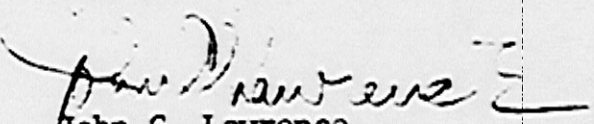
"Insofar as the accused's conviction rests on a courtroom identification in fact the fruit of a suspect pretrial identification which the accused is helpless to subject to effective scrutiny at trial, the accused is deprived of that right of cross-examination which is an essential safeguard to his right to confront the witnesses against him. *Pointer v. Texas* 380 U.S. 400."

Additional authorities to support appellant's contention that the trial Court erred in denying a mistrial are cited above.

C O N C L U S I O N

WHEREFORE, the conviction in the Court below should be reversed and remanded for a new trial, or for such relief as to the Court seems just and proper.

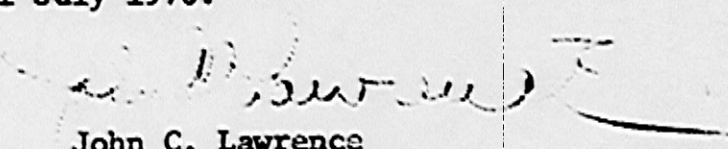

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing brief for appellant were served, by hand, on John A. Terry, Esquire, Office of the United States Attorney, United States Courthouse, Washington, D.C. 20001, this 22nd day of July 1970.


John C. Lawrence